IN THE

Supreme Court of the United States

October Term, 1940
No. 652

FARMERS UNDERWRITERS ASSOCIATION,

Petitioner,

vs.

SCOTT CARTER, as Administrator of the Estate of John P. Carter, Deceased.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOSEPH D. BRADY,
433 South Spring Street,
Los Angeles, California.
Attorney for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

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The petitioner, Farmers Underwriters Association, a corporation, by its attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on October 28, 1940, reversing the decision of the District Court of the United States for the Southern District of California, Central Division.

Opinions Below.

The opinion of the District Court [R. 36-40] is unreported. The opinion of the Circuit Court of Appeals [R. 58-64] is reported ..... F. (2d) ..... The judgment of the Circuit Court of Appeals was entered on October 28, 1940. [R. 65.] The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether a letter written by the Acting Deputy Commissioner of Internal Revenue to the petitioner five days *prior* to the date on which the Commissioner signed the rejection schedule on which taxpayer's claim for refund was scheduled is the "notice of the disallowance" required by Section 3226 of the Revised Statutes, as amended by Section 1103(a) of the Revenue Act of 1932.

Statutes Involved.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that

time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. * * * (U. S. C., Title 26, Sec. 1672.)

Statement.

Petitioner overpaid its capital stock taxes for the year ended June 30, 1933 in the amount of $480.00, and filed an adequate and timely claim for refund thereof. So much the Government concedes.

On February 28, 1934, the Commissioner of Internal Revenue signed rejection schedule Number ST–Rej. 3399, on which petitioner's claim for refund, filed September 29, 1933, was listed. [R. 17-18.] The *only* letter or "notice" mailed by the Commissioner to the petitioner *subsequent* to his signing of the disallowance schedule was dated May 5, 1934. [R. 18.] This action was commenced April 30, 1936, and the District Court held that it was timely because begun within "two years from the date of mailing by registered mail by the Commissioner of a notice of the disallowance * * * of the claim to which such suit or proceeding relates."

The Circuit Court of Appeals held that when the Commissioner signed the disallowance schedule on February 28, 1934, he did a superfluous act [R. 63]; that the petitioner's claim had been rejected or disallowed on February 23, 1934; and that a letter written that day was the "notice of the disallowance" required by the applicable statute.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that a "notice of the disallowance" may be given *before* the act of disallowance—the signing by the Commissioner of the rejection schedule—has occurred.

2. In holding that the action was not seasonably filed.

Reasons for Granting the Writ.

1. The question involved is one of importance in the administration of the revenue laws and has not been, but should be, settled by this Court. Its importance is perhaps best illustrated by the attitude taken by the Department of Justice in the case at bar. By stipulation, the printing of the record in the Circuit Court of Appeals was deferred pending decision of this Court in *Haggar Co. v. Helvering,* 308 U. S. 389. That decision, rendered January 2, 1940, showed that petitioner had overpaid its tax and that the Commissioner had erred in disallowing petitioner's claim for refund. As the opinion of the District Court was not reported, it could hardly have been embarrassing to the Government as a precedent, and as the overpayment was only $480.00, the Government must have considered the principle involved an important one—otherwise it would hardly have been justified in burdening the Circuit Court of Appeals with the prosecution of its appeal. If important to the Government prior to the decision of the Circuit Court of Appeals, the principle can hardly be less important now.

2. The decision below conflicts in principle with decisions of this Court as to what constitutes a "disallowance" of a claim for refund; see *United States v. Michel,* 282 U. S. 656 (1931), and *U. S. v. Henry Prentiss & Co.,* 288 U. S. 73, in the latter of which this Court said (p. 83):

> * * * The Commissioner rejected the claim on September 3, 1926, *by signing* the rejection schedule. * * *[*]

The decision below is likewise in conflict with the decision of the Court of Claims in *Savannah Bank & Trust Co. v. U. S.,* 58 F. (2d) 1068, 1070.

Argument.

Prior to the amendment made by Section 1103(a) of the Revenue Act of 1932, the period of limitation for bringing suit began with the *act* of disallowance of a claim for refund; giving of *notice* of disallowance was not material. *U. S. v. Michel,* 282 U. S. 656 (1931). This Court said, under the prior statute, that "disallowance" occurs when the Commissioner signs the rejection schedule. *U. S. v. Henry Prentiss & Co.,* 288 U. S. 73 (1931). The Court of Claims, in *Savannah Bank & Trust Co. v. U. S.,* 58 F. (2d) 1068, in holding that a suit was timely, said (p. 1070):

> * * * If it is shown that the Commissioner signed a schedule of rejection, the date on which such schedule is approved must be taken as the date of disallowance. * * *

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*Italics supplied wherever they appear.

There was apparently a time—prior to 1932—when it was not the invariable practice for the Commissioner to disallow a claim for refund by signing a rejection schedule. But sometime prior to enactment of the Revenue Act of 1932, here material, the Commissioner did establish the regular practice of signing a rejection schedule "in *every* case." This is shown by a statement in the *Savannah Bank* case, *supra,* decided May 31, 1932, as follows (p. 1070):

> * * * It appears that it was not the practice of the Commissioner of Internal Revenue until recently to sign an official schedule of rejection in every case in which a claim had been filed. * * *

In adopting the 1932 amendment to Section 3226 of the Revised Statutes, applicable here, Congress obviously was changing the rule as expounded in the *Michel* case, *supra.* Congress desired taxpayers to be advised by registered mail of the "disallowance", and clearly provided that the two-year period for bringing suit should not commence to run until (1) a claim had been "disallowed" and (2) the Commissioner had mailed notice of such disallowance. Now, in view of the uniform rule of the decisions under the prior statute, that "disallowance" occurred when the Commissioner signed the rejection schedule, Congress must have used the word in that sense in the 1932 amendment, especially since the Commissioner had theretofore established the regular practice of signing a rejection schedule *in every case.* Thus Congress clearly contemplated and intended that *after* the Commissioner had disallowed a claim by signing a rejection schedule, he would mail notice thereof; in the very nature of things human, one cannot give notice that an

act has occurred until after it has been done. That this was the construction given by the Treasury to the 1932 amendment immediately after its enactment, is shown by the language of the multigraphed form (213M) which it uses for giving the statutory notice [but which the record shows was not used in the case at bar, R. 18]—a form which counsel for petitioner has been advised by the Bureau was first adopted June 9, 1932, three days after the approval of the Revenue Act of 1932. Counsel herein has observed in his practice that Form 213M has been used by the Treasury in numerous instances within his knowledge; indeed, except for the case at bar, he knows of no case where the Treasury failed to use it. In the case of another client of counsel, Form 213M was mailed by the Treasury on July 13, 1937, and the entire body of the form, with date and schedule number inserted thereon by typewriter, reads as follows:

> Reference is made to Bureau letter dated June 21, 1937, wherein you were informed that the claim for refund indicated above would be disallowed. The letter also stated the reasons for the proposed disallowance.
>
> The claim having been disallowed or rejected on Schedule numbered 23450 , this notice of disallowance is sent to you by registered mail as required by Section 1103 (a) of the Revenue Act of 1932.

The precise language, "*having been* disallowed or rejected on Schedule numbered 23450," shows that the Treasury construed the 1932 amendment as requiring it to disallow first—by signing a rejection schedule—and to mail notice of disallowance *later*. A subordinate official may well have concluded, on February 23, 1934, that petitioner's

claim should be rejected, but as the Commissioner did not sign the rejection schedule until February 28, 1934, "the matter was still *in fieri*"* and could have been recalled on, for example, February 27, 1934. Until February 28, 1934, therefore, the claim was not "disallowed" and there was no final action as to which the statutory "notice" could be given.

If, as the Government contends, petitioner's claim was disallowed on February 23, 1934, and the letter of that date is the notice required by the statute, why did the Commissioner sign Schedule Number ST–Rej. 3399, on February 28, 1934? [R. 17-18.] Why was a notation made on the claim for refund reading as follows: "St–Rej. 3399, Feb. 28, 1934"? [R. 25.]

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH D. BRADY,
Attorney for Petitioner,

433 South Spring Street,
Los Angeles, California.

December, 1940.

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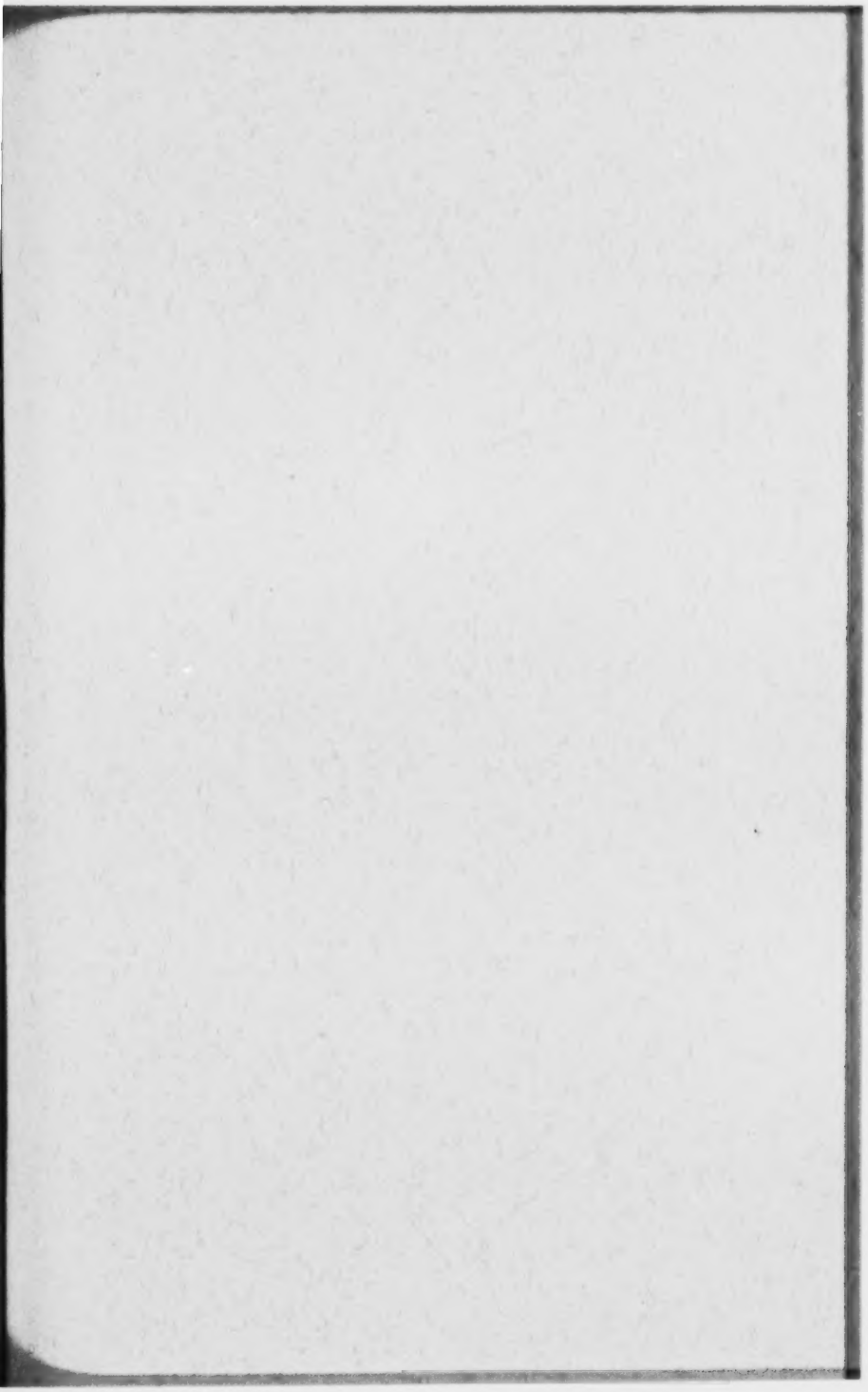
*Mr. Justice Cardozo in *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62.



Due service of the within Petition is hereby acknowledged this.....day of December, A. D. 1940.

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Attorneys for Respondent.

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